LUBA
FEB 21 2025 PM 01:30

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JUNIPER INSTITUTE, LLC,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

CAREY BRENNAN and
PRONGHORN COMMUNITY ASSOCIATION,
Intervenors-Respondents.

LUBA No. 2024-077

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Alex J. Berger filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief were Corinne S. Celko and Emerge Law Group.

Stephanie Marshall filed the respondent's brief and argued on behalf of respondent.

Carey Brennan filed the intervenor-respondent's brief and argued on behalf of themselves.

Andrew H. Stamp represented intervenor-respondent Pronghorn Community Association.

ZAMUDIO, Board Chair; RUDD, Board Member; RYAN, Board Member, participated in the decision.

REVERSED 02/21/2025

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals a board of commissioners decision denying petitioner's applications for a conditional use permit (CUP) and site plan review for a psilocybin service center on property in the Exclusive Farm Use (EFU) Zone and Destination Resort (DR) Combining Zone.

MOTION TO INTERVENE

Carey Brennan (intervenor) and Pronghorn Community Association move to intervene on the side of respondent. No party opposes those motions and they are allowed.

BACKGROUND

We start by setting out the applicable law and relevant facts as context for the assignments of error. In 2020, Oregon voters passed Measure 109, a citizen-initiated ballot measure directing the Oregon Health Authority (OHA) to develop a program to permit persons 21 years of age and older to be provided psilocybin services by licensed service providers in Oregon. ORS 475A.200 – 475A.220. As relevant to this appeal, the Oregon Psilocybin Services Act (PSA) allows OHA to issue licenses to operate a psilocybin service center, that is,

> "an establishment:
>
> "(a) At which administration sessions are held; and
>
> "(b) At which other psilocybin services may be provided." ORS 475A.220(13).

"'Psilocybin services' means services provided to a client before,

during, and after the client's consumption of a psilocybin product, including:

"(a) A preparation session;

"(b) An administration session; and

"(c) An integration session." ORS 475A.220(16).

The PSA provisions "are designed to operate uniformly throughout the state and are paramount and superior to and fully replace and supersede any municipal charter amendment or local ordinance inconsistent with the provisions of" the PSA. ORS 475A.524. However, "the governing body of a city or county may adopt ordinances that impose reasonable regulations on the operation of businesses located at premises for which a license has been issued under" the PSA. ORS 475A.530(2). "[R]easonable regulations" that a county may impose include reasonable limitations on where a psilocybin service center may be located. ORS 475A.530(1)(e). The county has adopted provisions governing the location of psilocybin service centers in the county. As relevant here, Deschutes County Code (DCC) 18.113.030(D) authorizes, in a destination resort, commercial services including psilocybin service centers licensed by the OHA, subject to the conditional use criteria in DCC 18.128.015. DCC 18.113.030(D)(7).

The subject property is within a destination resort called Juniper Preserve (the Resort). In 2024, petitioner sought county approval of applications for a CUP and site plan review for a psilocybin service center on the subject property. County planning staff referred petitioners' CUP and site design review

applications to a county hearings officer, who held a public hearing and issued a decision denying the applications. Petitioner appealed the hearings officer's decision to the board of commissioners. The board accepted de novo review limited to the three bases for the hearings officer's decision denying the applications. After a public hearing, the board upheld the denial. The board rejected two of the hearings officer's bases for denial and denied the applications based solely on its conclusion that petitioner had not demonstrated compliance with a conditional use criterion in DCC 18.128.015(A)(2) that requires petitioner to demonstrate adequate transportation access to the site.

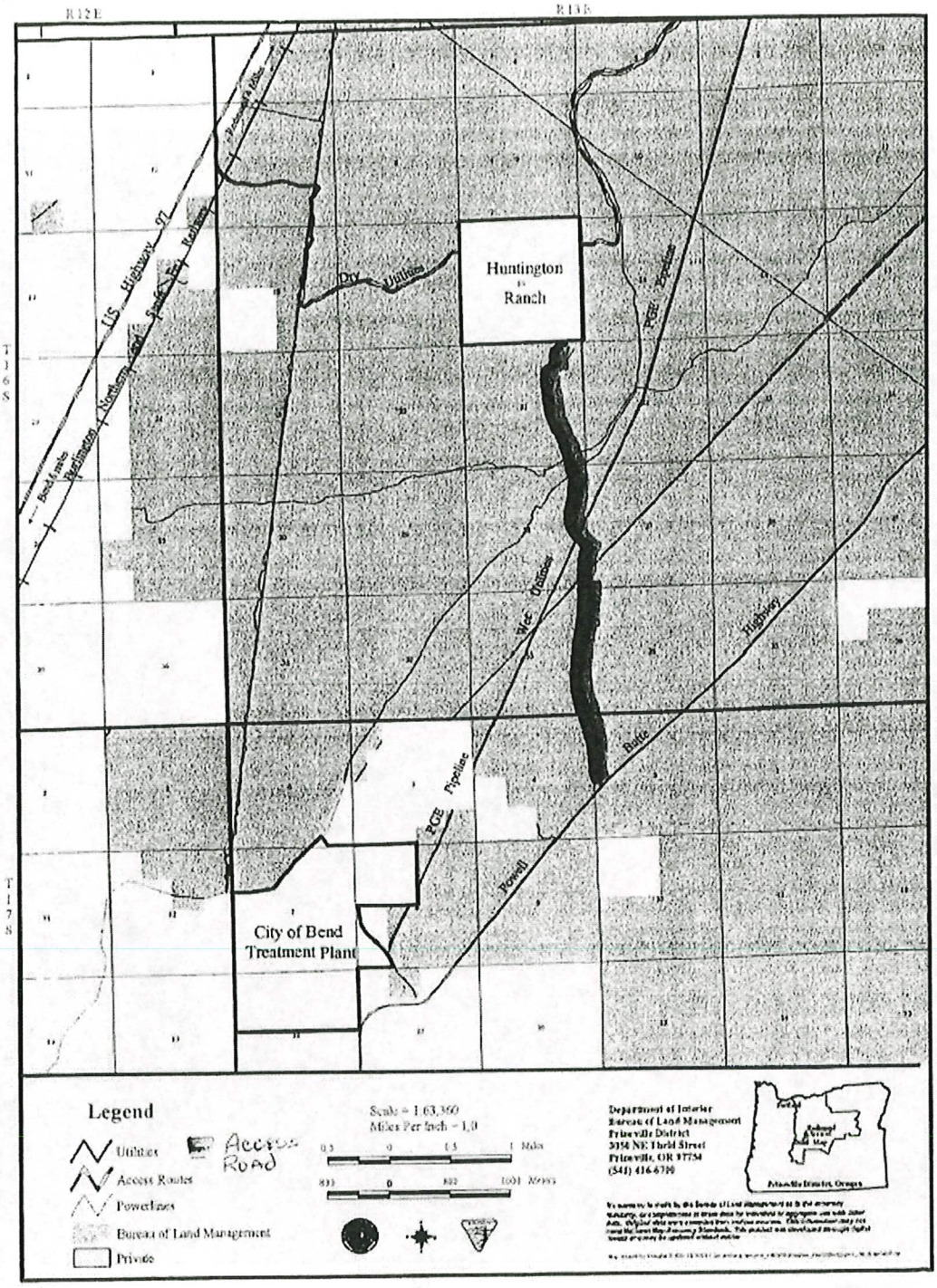
DCC 18.128.015 provides:

> "**General Standards Governing Conditional Uses**
>
> "Except for those conditional uses permitting individual single-family dwellings, conditional uses shall comply with the following standards in addition to the standards of the zone in which the conditional use is located and any other applicable standards of the chapter:
>
> "A. The site under consideration shall be determined to be suitable for the proposed use based on the following factors:
>
> "1. Site, design and operating characteristics of the use;
>
> "2. Adequacy of transportation access to the site; and
>
> "3. The natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values.
>
> "B. The proposed use shall be compatible with existing and projected uses on surrounding properties based on the factors listed in DCC 18.128.015(A).

"C. These standards and any other standards of DCC 18.128 may be met by the imposition of conditions calculated to ensure that the standard will be met."

The Resort is private property that is surrounded by federal public land that is managed by the Bureau of Land Management (BLM). In the image below, as we understand it, the white square labeled "Huntington Ranch" is the private land, surrounded by public land, on which the Resort and the subject property is located. The Pronghorn Club Drive resort access road is depicted as a thick black line. To access the site by vehicle, one must travel from the Powell Butte Road public right-of-way along the southern end of Pronghorn Club Drive, which traverses public land. A BLM right-of-way grant (BLM ROW) governs the Resort's use of Pronghorn Club Drive.[1] Once in the gated Resort, one would turn onto Nicklaus Drive, which abuts and fronts the site.

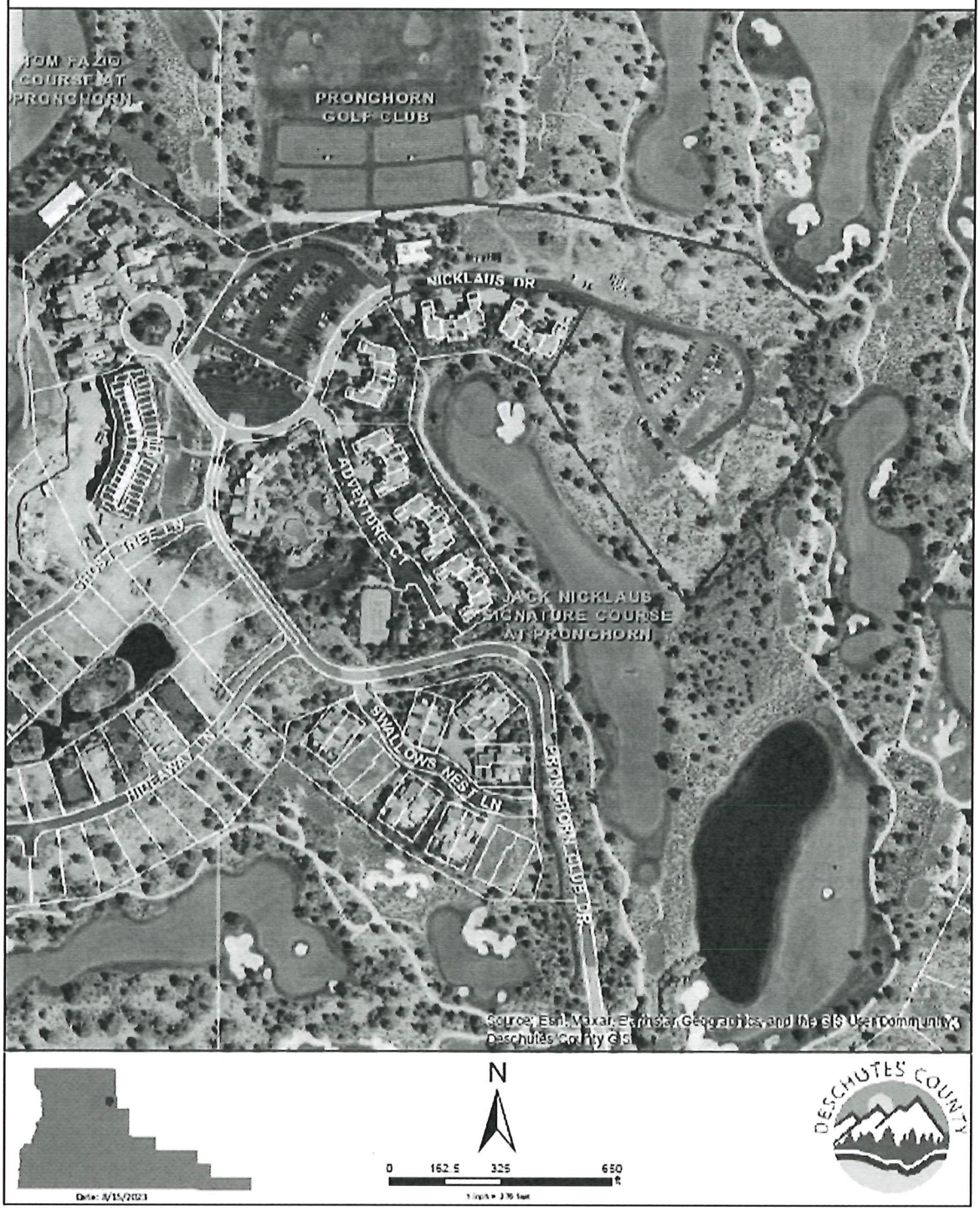
[1] The original BLM ROW grant was to Huntington Ranch LLC. Huntington Ranch LLC assigned the rights to the BLM ROW grant to High Desert Development, which later assigned those rights to Pronghorn Holdings, LLC. Record 201, 399.


R12E
R13E
T16S
T17S
Huntington Ranch
City of Bend Treatment Plant
US Highway 97
Burlington Northern and Santa Fe Railway
Dry Utilities
PGE Pipeline
Powell Butte Highway
Legend
Utilities
Access Roads
Powerlines
Bureau of Land Management
Private
Access Road
Scale = 1:63,360
Miles Per Inch = 1.0
Department of Interior
Bureau of Land Management
Prineville District
3050 NE Third Street
Prineville, OR 97754
(541) 416-6700

1

23050 NICKLAUS DR, BEND, OR 97701

Land Use File Nos: 247-23-000614-CU & 247-23-000615-SP



The BLM ROW grant governing use of Pronghorn Club Drive provides that it is "granted pursuant to Title V of the Federal Land Policy and Management Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761)" and it "is issued subject to the holder's compliance with all applicable regulations contained in Title 43 Code of Federal Regulations part 2800."[2] Record 399-400. "Failure of the holder to comply with applicable law or any provision of this right-of-way grant shall constitute grounds for suspension or termination thereof." *Id.*

As explained further below, the board's denial relies on the findings that "psilocybin cannot be transported across federal land." Record 11. That finding, in turn, is based on comments from Lisa Clark, a BLM Field Manager, and Christopher Streit, a BLM law enforcement officer. Clark's statement did not purport to interpret or rely on the BLM ROW grant and, instead, categorically stated that "[r]egardless of how it is used or prescribed, psilocybin remains a Schedule A narcotic under federal law. We do not have a position on the use of it on private land; however, under no circumstances can it be transported across federal lands." Record 263. Similarly, Streit stated:

> "While the use of psilocybin became legal in Oregon in 2023 under the [Psilocybin Services Act (PSA)], psilocybin remains a Schedule 1 controlled substance under the federal Controlled Substances Act.

---

[2] Title 43 CFR 2800 is titled "Rights-of-Way Under the Federal Land Policy and Management Act." Systems or facilities over public lands, including transportation systems such as roads, require a right-of-way grant. 43 CFR 2801.9(a)(5).

More specifically, recreational use of psilocybin on federal land remains illegal. I understand that the Juniper Preserve Resort is on privately owned land, however, as stated earlier, it is entirely surrounded by Federally owned Public Land managed by the BLM. With the proposal for the service center including the specific language of 'non-medical commercial use' the transportation of any and all psilocybin through federal land, which would most likely be on a federally granted right-of-way, would be a violation of federal law. There is not a legal means for ground transport of the product to the Juniper Preserve Resort." Record 357-38.

The board found:

"The Board adopts the Hearings Officer's findings regarding suitability of the site as it pertains to transportation access. In this case, the subject property and the entire destination resort is accessed via an easement across [BLM] land. Lisa Clark, Field Manager with the BLM, submitted comments dated July 11, 2024, that state psilocybin cannot be transported across federal land. The Board reviewed additional testimony and arguments that were submitted and upholds the Hearings Officer's denial of the subject application on the basis that DCC 18.128.015(A)(2) has not been satisfied." Record 11.

The hearings officer found that

"the site is suitable for the proposed use based on factors relating to the site, design, operating characteristics, and natural and physical features. However, * * * I do not find that the site is suitable based on the adequacy of transportation access and, therefore, DCC 18.128.015(A) is not satisfied." Record 30.

The hearings officer explained:

"Turning to DCC 18.128.015(A) first, it is undisputed that some of the transportation access to the site [petitioner] contemplates is acceptable under the BLM ROW approval. For example, there is no dispute in the record that guests of the resort can use the BLM ROW to access the resort and, therefore, get to the Service Center. The

question therefore arises whether a particular component of transportation access [petitioner] contemplates (transporting psilocybin across the BLM ROW) renders the entirety of the transportation access to the site inadequate if the BLM ROW cannot be used for that purpose. I find, based on this record, that it does.

"* * * * *

"The evidence in this record is that: (1) use of the BLM ROW requires compliance with federal law; (2) federal law prohibits transportation of psilocybin across federal lands; and (3) [petitioner] intends to use transportation access to the site across federal land to transport psilocybin. [Petitioner] acknowledges that its proposed use is not allowed by the express terms of the BLM ROW. Whether or not BLM ultimately enforces the requirements of the BLM ROW is therefore not relevant; on the face of the documents alone, [petitioner] has not established that it can do what it proposes to do. I do not agree with [petitioner's] assessment that denial of the Application on this basis amounts to enforcing federal law or somehow jeopardizes psilocybin use across the state. My analysis looks only to the evidence in the record. A different record may result in a different conclusion, for example where transportation access does not rely solely on crossing federal lands, or where the transportation of psilocybin is not required because it is grown on site.

"Based on the foregoing, I find that [petitioner] has not met its burden of demonstrating that the site is suitable for the proposed use pursuant to the transportation access factor of DCC 18.128.015(A)(2)." Record 32-33.

For reasons explained below, we reverse the county's denial.

SECOND ASSIGMENT OF ERROR

Petitioner's second assignment of error is that the board's decision is unsupported by adequate findings and substantial evidence. More specifically, petitioner's second assignment of error challenges the county's finding that

"[Petitioner] acknowledges that its proposed use is not allowed by the express terms of the BLM ROW." Record 32. The hearings officer made that finding and the board decision incorporates it. We will remand a decision that is not supported by substantial evidence or adequate findings. OAR 661-010-0071(2)(a), (b).

In *McNichols v. City of Canby*, which petitioner cites, we explained that land use review bodies are not competent to render interpretations of easement terms and that a final and authoritative determination regarding the intent and scope of deeds, easements, and similar real estate agreements can be obtained only in circuit court, based on application of real estate law. 79 Or LUBA 139, 146 (2019). Respondents emphasize that we stated in *McNichols* that *unambiguous* provisions in a private contract can be relied on by a decision maker as substantial evidence without the need for interpretation when determining compliance with an approval criterion. 79 Or LUBA at 146 n 8. As we understand it, respondents contend that the county's conclusion that the BLM ROW prohibits the transportation of psilocybin is both unambiguous and undisputed.

In the second assignment of error, petitioner argues that the hearings officer's finding that "[petitioner] acknowledges that its proposed use is not allowed by the express terms of the BLM ROW" is not supported by substantial evidence and, as discussed below, that the board's decision fails to address petitioner's challenge to that finding during the local appeal. Petitioner argues that the BLM ROW does not "on its face" unambiguously incorporate the federal Controlled Substances Act as "applicable law."

In a letter to the board, petitioner challenged the hearing officer's finding as inaccurate and unsupported by the record.

> "The findings also rely on inaccurate facts. Without citing to any evidence in the record, the Hearings Officer states, '[petitioner] acknowledges that its proposed use is not allowed by the express terms of the BLM ROW [Grant].' However, [petitioner] made no such acknowledgment, and, as described in this letter, [petitioner] does not acknowledge that the Proposed Use is 'not allowed' by the BLM ROW Grant, and, in fact, asserts the opposite." Record 183.

Respondents do not respond to petitioner's findings challenge. We agree that the board erred in not adopting findings addressing that challenge. *See Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979) (findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below). However, because we conclude below that the petitioner is entitled to reversal with an order to approve under ORS 197.835(10)(a)(A), we will not remand for further findings and, instead, proceed to address petitioner's substantial evidence challenge.

A finding of fact is supported by substantial evidence if the record, viewed as a whole, would permit a reasonable person to make that finding. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). In addition, the substantial evidence standard of review includes a substantial reason requirement. To satisfy that requirement, a decision must supply an explanation

connecting the facts and the result reached. *Rogue Advocates v. Jackson County*, 282 Or App 381, 388–89, 385 P3d 1262 (2016).

We agree with petitioner that the challenged finding is not supported by substantial evidence. Petitioner contends that petitioner never acknowledged or conceded that its proposed use is not allowed by the express terms of the BLM ROW. Instead, petitioner contends that it argued to the county that whether the federal Controlled Substances Act prohibits the possession and transportation of psilocybin is not relevant to the county's consideration of whether there is adequate transportation access to the site.

The county responds that petitioner's argument in the second assignment of error "is a red herring" because "[i]rrespective of the actual language in the BLM ROW, substantial evidence in the record supports the [board's] determination that psilocybin cannot legally be transported over federal lands, including the BLM ROW." Respondent's Brief 11. The county also argues that the BLM ROW "plainly requires * * * Petitioner to comply with all applicable federal regulations." *Id.* at 12.

Intervenor also argues that the hearings officer's finding is supported by substantial evidence. Intervenor quotes the following passages from petitioner's written testimony in response to Streit's and Clark's emails:

> "The letter from BLM Supervisory Staff Law Enforcement Ranger Christopher Streit, dated March 18, 2024, does not contravene [petitioner's] compliance with the county's conditional use standards and criteria. Nothing in the letter terminates or indicates

BLM's intent to terminate the BLM ROW Grant, nor does it indicate that Ranger Streit's assertions constitute BLM's, or any other federal agency's, official opinion or policy.

"Rather, the letter asserts points that [petitioner] has always acknowledged. [Petitioner] agrees that 'recreational use of psilocybin on federal land remains illegal,' that 'transportation of any and all psilocybin through federal land, . . . , would be a violation of federal law,' and, that there 'is not a [federally] legal means for ground transport of the product to the Juniper Preserve Resort' (emphasized insertion added). [Petitioner] merely contends that federal illegality does not constitute a basis for denial under county code. If it did constitute a denial basis then no one could locate a psilocybin service center anywhere in the county because possession of psilocybin on any land in the county is just as federally illegal as possession on federal land. Again, **the entire state-legal psilocybin services industry constitutes federally illegal activity**. That does not empower the county to ignore its duty to approve a land use application that meets its standards and criteria. Should BLM or any other federal law enforcement agency choose to enforce federal law against any person transporting psilocybin on the BLM right-of-way or violating any other federal law on or off federal land, it can certainly do so through the federal criminal law enforcement apparatus. But the county did not list 'federal legality' in its code as an approval or denial criterion, without which it lacks the authority to deny this application on that basis." Record 410 (underscoring and boldface in original).

"Field Manager Lisa Clark's July 11, 2024 email likewise does not purport to suspend or terminate the BLM ROW Grant. Her comment does not even refer to the BLM ROW Grant at all. She states only: 'Regardless of how it is used or prescribed, psilocybin remains a Schedule A narcotic under federal law. We do not have a position on the use of it on private land; however, under no circumstances can it be transported across federal lands.' Again, Ms. Clark's letter restates what [petitioner] freely admits – that psilocybin possession is unlawful under federal law and that federal law prohibits its transportation across federal lands (and any other land in the US). However, Ms. Clark provides no basis to find that [petitioner] lacks

> adequate transportation access to the Resort or the Proposed Site because she provides no evidence that the BLM ROW is terminated." Record 112-13 (internal footnote omitted).

Intervenor argues that, from that quoted testimony, a reasonable person would conclude that "[p]etitioner would use the BLM ROW to transport psilocybin to the Proposed Site and that the express terms of the BLM ROW Grant would not allow it" because "[i]f the express terms of the BLM ROW Grant allow the BLM ROW to be used to transport psilocybin to the Proposed Site, then there would be no violation of the Grant and no grounds to terminate it." Intervenor-Respondent's Brief 23.

We agree with petitioner that the cited statements are not evidence that a reasonable person would find equate to an admission by petitioner that the BLM ROW prohibits the transportation of psilocybin. Instead, those statements merely acknowledge that psilocybin possession is prohibited by federal law. The finding that "[Petitioner] acknowledges that its proposed use is not allowed by the express terms of the BLM ROW" is not supported by substantial evidence.

The hearings officer also found, and the board incorporated the finding, that "*on the face of the documents alone*, [petitioner] has not established that it can do what it proposes to do." Record 32 (emphasis added). We agree with petitioner that that finding is also not supported by substantial evidence or substantial reason. The BLM ROW provides: "This grant is issued subject to the holder's compliance *with all applicable regulations contained in Title 43 Code of Federal Regulations part 2800*" and "[f]ailure of the holder to comply with

applicable law or any provision of this right-of-way-grant shall constitute grounds for suspension or termination thereof." Record 400 (emphases added). The BLM ROW is ambiguous as to what constitutes "applicable law" for the purposes of that instrument. On the one hand, the grant refers to "all applicable regulations contained in Title 43 Code of Federal Regulations part 2800," which we understand to mean the law governing rights-of-way under the Federal Land Policy and Management Act. It is unclear to us whether or how the Federal Land Policy and Management Act prohibits transportation of psilocybin. Moreover, the county's findings do not rely on the Federal Land Policy and Management Act and instead, rely on BLM employees' statements that reference the federal Controlled Substances Act. It is unclear whether the federal Controlled Substances Act is "applicable law" under the terms of the BLM ROW. For those reasons, we agree with petitioner that the county's finding that the BLM ROW on its face unambiguously prohibits the proposed use is not supported by substantial evidence or substantial reason.

The second assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioner argues that the board misconstrued DCC 18.128.015(A)(2) as a mandatory approval standard and further misinterpreted the geographic and subject scope of that provision. We will remand or reverse a decision that misconstrues the applicable law. OAR 661-010-0071(2)(d), (1)(c).

Petitioner argues that, because the board adopted the hearings officer's interpretation, the board's interpretation is not entitled to deferential review and that we should, instead, review whether the interpretation is correct. Intervenor and the county (together, respondents) respond that the board's interpretation that DCC 18.128.015(A)(2) is a mandatory approval standard and the board's construction of the geographic and subject scope of that provision is plausible and entitled to deference.

We agree with respondents that we will review the board's interpretation of DCC 18.128.015(A)(2) under the deferential standard required by ORS 197.829(1). *Rawson v. Hood River County*, 75 Or LUBA 200 (2017). We must defer to the board's interpretation if that interpretation is not "inconsistent with the express language of the comprehensive plan or land use regulation" or inconsistent with the underlying purposes and policies of the plan or regulation. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) (applying ORS 197.829(1)).

> "[T]he plausibility determination under ORS 197.829(1) is not whether a local government's code interpretation best comports with principles of statutory construction. Rather, the issue is whether the local government's interpretation is plausible because it is not expressly *inconsistent* with the text of the code provision or with related policies that 'provide the basis for' or that are 'implemented' by the code provision, including any ordained statement of the specific purpose of the code provision at issue." *Kaplowitz v. Lane County*, 285 Or App 764, 775, 398 P3d 478 (2017) (emphasis in original).

A. Mandatory Transportation Access Factor

We agree with respondents that the county's construction of DCC 18.128.015(A)(2) as a mandatory approval standard—as opposed to merely one factor to be considered and weighed among other factors in determining whether the site is suitable for the proposed use—is plausible. DCC 18.128.015(A) lists three factors that the county must consider in determining whether the site is suitable for the proposed use. The county plausibly determined that if any one of those three factors demonstrates that the site is not suitable for the proposed use, then the county may deny the CUP, regardless of whether consideration of the other two factors weigh in favor of a conclusion that the site is suitable for the proposed use.

Petitioner cites *Oregon Coast Alliance v. Clatsop County*, LUBA No 2022-076 (Jan 10, 2023) (*OCA*), in which we deferred to the county's conclusion under a similarly worded conditional use suitability standard that the enumerated considerations were factors and not independent standards. These types of conditional use criteria are worded in a way to allow the county discretion. Similar site suitability language may plausibly be interpreted in two very different ways. Our reasoning in *OCA* does not compel a conclusion that the county's interpretation in this case is not plausible.

B. Geographic Scope

Petitioner argues that the board improperly construed DCC 18.128.015(A)(2) by expanding its geographic scope beyond the access road

adjacent to "the site." According to petitioner, DCC 18.128.015(A)(2) is concerned only with site access—that is, whether the site itself is physically accessible over roads and driveways. Petitioner argues that the county should only consider the immediate site access road, Nicklaus Drive, and not consider whether the more distant road, Pronghorn Club Drive, provides adequate access.

Respondents respond, and we agree, that DCC 18.128.015(A)(2) requires petitioner to demonstrate the "adequacy of transportation access to the site," and that the county can plausibly look beyond the immediate site access to consider the roads, public and private, that connect the site to the wider transportation system, here Pronghorn Club Road, which is a private road that connects to the public Powell Butte Road.

C. Subject Scope

Petitioner argues that the county's interpretation of DCC 18.128.015(A)(2) implausibly overextends its application beyond the physical access to the proposed site to encompass access under a private agreement. Petitioner argues that context demonstrates that the DCC 18.128.015(A)(2) transportation access factor applies only to the physical characteristics of the access to the site, not the terms of any private agreement governing a right-of-way.

Again, DCC 18.128.015(A)(2) requires the county to determine whether the site is suitable for the proposed use considering "[a]dequacy of transportation access to the site[.]" The focus of DCC 18.128.015(A)(2) is on "access." As used in DCC Title 18, "'[a]ccess' means the right to cross between public and private

property allowing pedestrians and vehicles to enter and leave property." DCC 18.040.030.

The DCC does not define "adequacy," "adequate," "transportation," or "site." Accordingly, the plain meaning of those terms applies qualifying the code defined term "access." "Adequacy" means "the quality or state of being adequate : sufficiency for a purpose." *Webster's Third New Int'l Dictionary* 25 (unabridged ed 2002). "Adequate" means "fully sufficient for a specified or implied requirement; *often* : narrowly or barely sufficient." *Id.* "Adequate" also means "legally sufficient." *Id.* "Transportation" means "an act, process, or instance of transporting or being transported." *Webster's* at 2430. "Transport" means "to transfer or convey from one * * * place to another." *Id.* "Site" means "land made suitable for building purposes by dividing into lots, laying out streets, and providing facilities." *Webster's* at 2128.

Petitioner argues that DCC 18.128.015(A)(2)'s transportation access factor applies only to the physical characteristics of the access to the site, not the terms of any private agreement governing a right-of-way. Respondents respond, and we agree, that the county plausibly interpreted "access" to include the *legal* right to cross between public and private property and not merely the physical ability to reach the site over roads. As explained above, the code definition of "access" includes "the right to cross." DCC 18.040.030. Similarly, the term "adequate" includes the concept of legal sufficiency. The board can plausibly interpret adequate access to mean legally and physically sufficient access. That

is, even if a private road or driveway could provide physical access to a site, if an applicant has not demonstrated a legal right to cross that road or driveway, then the county can determine that the access is not adequate.

However, we agree with petitioner that the county erred by construing "access" to regulate transportation of psilocybin. DCC 18.128.015(A)(2), construed consistently with "access" as defined in DCC 18.040.030, requires the county to consider legal and physical access for pedestrians and vehicles. The county's construction that the term "access" in DCC 18.128.015(A)(2) regulates the transport of objects that may be contained on a pedestrian or in a vehicle is inconsistent with definition of "access" in DCC 18.040.030, which refers only to pedestrians and vehicles. It is undisputed that the BLM ROW provides adequate legal and physical vehicular access to the site. Whether vehicles that access the site contain objects that violate federal law or the BLM ROW is not plausibly governed by DCC 18.128.015(A)(2), when read with context of the definition of "access" in DCC 18.040.030.

The first assignment of error is denied in part and sustained in part.

FOURTH ASSIGNMENT OF ERROR

In the fourth assignment of error, petitioner argues that the county exceeded its authority by applying and interpreting federal law to deny the applications, citing ORS 197.835(10)(a)(A) and *Waveseer of Oregon, LLC v. Deschutes County*, 81 Or LUBA 583 (2020), *aff'd*, 308 Or App 494, 482 P3d 212 (2021). ORS 197.835(10)(a)(A) provides:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
>
> > "Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]"

In *Waveseer*, we explained that we will reverse a decision under ORS 197.835(10)(a)(A) where we conclude that "the local government denied the applications by relying on standards that either (1) were not applicable to the application; (2) could not be applied to the application; or (3) were not land use standards." 81 Or LUBA at 601. In *Waveseer*, we explained:

> "In *Parkview Terrace Dev. LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014), we reversed a city council decision denying site plan approval and variance for a needed housing development. The city council gave a total of ten reasons why it denied the applications. Seven of the site plan review criteria the city council relied on to support its denial could not be applied because the application was for development of 'needed housing' and we determined that those standards were not 'clear and objective,' as required by ORS 197.307(4). The city council also inappropriately relied on three inapplicable criteria: (1) an 'adequate' parking standard that did not exist in the city's code, (2) an internal circulation standard that did not apply to the proposed residential use, and (3) a variance criterion that did not apply under the circumstances surrounding the development. We concluded that all ten of the reasons that the city council gave for denying petitioner's applications were 'outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances.' *Id.* at 57-58. Accordingly, we reversed the city council's decision and ordered the city to approve the petitioner's applications for a variance and site plan approval. *Id.* at 58.

> "In *Oster v. City of Silverton*, 79 Or LUBA 447 (2019), the city council denied a tentative subdivision plan based on a standard that we concluded that the city had not incorporated into its land use regulations with the level of specificity required by statute for standards applicable to limited land use decisions. Thus, we concluded that the only reason that the city council gave for denying petitioner's application is 'outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances.' *Id.* at 457. Accordingly, we reversed the city council's decision and ordered the city to approve the petitioner's application. *Id.* at 458." *Waveseer*, 81 Or LUBA at 601.

We understand petitioner to argue that the federal Controlled Substances Act is not a land use regulation and that DCC 18.128.015(A)(2) does not refer to or incorporate federal regulation of psilocybin as part of the county land use standards. Petitioner poses that issue as an interpretive issue and not a codification issue. We understand petitioner to argue that DCC 18.128.015(A)(2) is a county land use regulation and, in applying that provision, the county must follow state law, which allows psilocybin treatment, and that the county may not rely on the federal Controlled Substances Act prohibition against persons possessing or transporting psilocybin on federal land to deny the applications. ORS 475A.200 - 475A.722 (psilocybin regulation). Petitioner argues that the denial violates ORS 475A.530(2) because it violates the prohibition against a local government imposing unreasonable regulations on licensed psilocybin business operations.

ORS 475A.530(2) provides:

> "Notwithstanding ORS 30.935, 215.253 (1) or 633.738, the governing body of a city or county may adopt ordinances that

impose reasonable regulations on the operation of businesses located at premises for which a license has been issued under ORS 475A.210 to 475A.722 if the premises are located in the area subject to the jurisdiction of the city or county, except that the governing body of a city or county may not adopt an ordinance that prohibits a premises for which a license has been issued under ORS 475A.305 from being located within a distance that is greater than 1,000 feet of another premises for which a license has been issued under ORS 475A.305."

ORS 475A.530(1) provides:

"For purposes of this section, 'reasonable regulations' includes:

"(a) Reasonable conditions on the manner in which a psilocybin product manufacturer that holds a license issued under ORS 475A.290 may manufacture psilocybin products;

"(b) Reasonable conditions on the manner in which a psilocybin service center operator that holds a license issued under ORS 475A.305 may provide psilocybin services;

"(c) Reasonable limitations on the hours during which a premises for which a license has been issued under ORS 475A.210 to 475A.722 may operate;

"(d) Reasonable requirements related to the public's access to a premises for which a license has been issued under ORS 475A.210 to 475A.722; and

"(e) Reasonable limitations on where a premises for which a license may be issued under ORS 475A.210 to 475A.722 may be located."

A. Waiver

Intervenor asserts, in a footnote, that

"Intervenor did a word search of the written record and was unable to find that Petitioner raised the issue of a violation of ORS 475A.540 in the local proceedings. The issue is not discussed on the

> pages of the written record (Rec. 109 - 110) cited by Petitioner to supports its assertion this issue was preserved. Accordingly, this issue may not be reviewable by LUBA under ORS 197.717. Nevertheless, Intervenor will address the merits of the argument." Intervenor-Respondent's Brief 39 n 14.

Intervenor states that they did a word search for ORS 475A.540 and did not find it in the record. ORS 475A.540 does not contain the time, place and manner restrictions; ORS 475A.530 does. Intervenor also cites ORS 197.717 which addresses topics including technical assistance by state agencies, model ordinances, and rural economic development. However, despite those apparent typos, we understand intervenor to assert that petitioner has not established that petitioner preserved the issue petitioner raises under ORS 475A.530, as required by ORS 197.797.

ORS 197.835(3) provides that LUBA "may only review issues raised by any participant before the local hearings body as provided by ORS 197.195, 197.622 or 197.797, whichever is applicable." ORS 197.797(1), in turn, provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

The "raise it or waive it" principle does not limit the parties on appeal to the exact same arguments made below, but it does require that the issue be raised below with sufficient specificity to prevent "unfair surprise" on appeal. *Boldt v.*

Clackamas County, 21 Or LUBA 40, 46, *aff'd*, 107 Or App 619, 813 P2d 1078 (1991); *Friends of Yamhill County v. Yamhill County*, LUBA No 2021-074 (Apr 8, 2022), *aff'd*, 321 Or App 505 (2022) (nonprecedential memorandum opinion), *rev den*, 370 Or 740 (2023) (slip op at 5-6). A particular issue must be identified in a manner detailed enough to give the local government and the parties fair notice and an adequate opportunity to respond. *Boldt*, 21 Or LUBA at 46. When attempting to differentiate between "issues" and "arguments," there is no "easy or universally applicable formula." *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690 (2001).

A petitioner is required to demonstrate in the petition for review "that the issue raised in the assignment of error was preserved during the proceedings below. Where an assignment raises an issue that is not identified as preserved during the proceedings below, the petition shall state why preservation is not required." OAR 661-010-0030(4)(d).

In the petition for review fourth assignment of error preservation statement, petitioner states that "[p]etitioner contended both orally and in writing that federal prohibition against psilocybin may not constitute a basis for denial." Petition for Review 40 (citing Record 109-10). In the reply brief, in response to intervenor's waiver challenge, petitioner identifies specific language from the previously cited testimony at Record 110 as follows:

> "Conversely, denying all psilocybin and marijuana applications would nullify all County ordinances allowing psilocybin or marijuana uses in any zone in the County and conflict with state law,

> which limits the County to reasonable time, place, manner restrictions only." Reply Brief 5.

While Petitioner did not specifically cite ORS 475A.530, petitioner raised the issue that any county code-based restraints on psilocybin operations are limited by state law to reasonable time, place, and manner restrictions. A petitioner adequately raises an issue under ORS 197.797(1) and 197.835(3) by citing the relevant legal standard, presenting argument that includes the operative terms of the legal standard, or taking other actions to raise the issue such that the local government knows or should know that the issue is one that needs to be addressed in its decision. *Reagan*, 39 Or LUBA at 690. This issue is preserved.

B. County Application of State and Federal Law

On the merits, intervenor maintains that ORS 475A.530 does not apply in this case, because the county's decision applies the existing county code and does not adopt any new ordinance regulating the operation of a state licensed psilocybin treatment center. Differently, the county apparently agrees that the county may not rely on its interpretation or application of federal law to deny the applications. However, the county contends that the county did not apply federal law to deny the applications and instead only referenced federal law as relevant to the issue of whether the BLM ROW provides adequate transportation access to the subject property for purposes of DCC 18.128.015(A)(2). See Respondent's Brief 13 (stating that the board's decision "was not *based on* federal law") (emphasis in original).

While ORS 475A.530(2) expressly authorizes a county to adopt reasonable regulations, it is implicit in that authorization that the county may not adopt unreasonable regulations. Similarly, the county may not apply its existing regulations in a manner that constitutes an unreasonable regulation. To read ORS 475A.530(2) as only limiting the county in adopting new ordinances, as intervenor argues, would render that limitation powerless and meaningless with respect to existing regulations. *See* ORS 475A.524 (providing that the PSA provisions "are designed to operate uniformly throughout the state and are paramount and superior to and fully replace and supersede any municipal charter amendment or local ordinance inconsistent with the provisions of" the PSA). We agree with petitioner that ORS 475A.530(2) prohibits the county from applying existing land use regulations in a manner that would violate the reasonable regulation limitation.

As explained above, the county code authorizes psilocybin service centers in destination resorts, subject to conditional use and site plan review. DCC 18.113.030(D)(7). ORS 475A.530 allows a local governing body to impose "reasonable regulations" on the operation of a licensed psilocybin business. "Reasonable regulations" include "[r]easonable limitations on where" a licensed psilocybin business "may be located." ORS 475A.530(1)(e). We agree with petitioner that the county's interpretation of DCC 18.128.015(A)(2) as prohibiting psilocybin transport across federal land constitutes an unreasonable limitation on where a licensed psilocybin business "may be located."

While the hearings officer attempted to limit their reasoning to the facts of this case, including the BLM ROW access, we agree with petitioner that the county's reasoning is not confined to the facts of this case. As we explained above, under the first assignment of error, we agree with respondents that DCC 18.128.015(A)(2) requires petitioner to demonstrate the "adequacy of transportation access to the site," and that the county can plausibly look beyond the immediate site access to consider the transportation system (*i.e.*, roads, public and private) that connect the site to the wider transportation system in order to obtain a CUP. Under the county's reasoning, a licensed psilocybin business requiring a CUP may not be located on any property within the county's jurisdiction with vehicular access over federally owned property even though state law allows psilocybin businesses. The county's reasoning is not limited to this case, where a private road crosses public land because the county maintains it is not interpreting the BLM ROW agreement. The county's conclusion is based on access over federal property.

We also conclude that the board improperly applied the federal Controlled Substances Act to deny the applications. The board's denial relied on the findings that "psilocybin cannot be transported across federal land." Record 11. That finding, in turn, was based on comments from Lisa Clark, a BLM Field Manager, and Christopher Streit, a BLM law enforcement officer. Clark's statement did not purport to interpret or rely on the BLM ROW and, instead, categorically stated that "[r]egardless of how it is used or prescribed, psilocybin remains a Schedule

A narcotic under federal law. We do not have a position on the use of it on private land; however, under no circumstances can it be transported across federal lands." Record 263.

Similarly, Streit stated:

> "While the use of psilocybin became legal in Oregon in 2023 under the [Psilocybin Services Act (PSA)], psilocybin remains a Schedule 1 controlled substance under the federal Controlled Substances Act. More specifically, recreational use of psilocybin on federal land remains illegal. I understand that the Juniper Preserve Resort is on privately owned land, however, as stated earlier, it is entirely surrounded by Federally owned Public Land managed by the BLM. With the proposal for the service center including the specific language of 'non-medical commercial use' the transportation of any and all psilocybin through federal land, which would most likely be on a federally granted right-of-way, would be a violation of federal law. There is not a legal means for ground transport of the product to the Juniper Preserve Resort." Record 357-38.

The county defends its decision by repeatedly referring to federal illegality under the federal Controlled Substances Act. See Respondent's Brief 4 ("psilocybin is a Schedule A narcotic, and transport of psilocybin over federal lands is prohibited under federal law, thereby resulting in a lack of access to the proposed psilocybin service center"); *id.* at 5 ("it undisputed that psilocybin is a Schedule A narcotic under federal law"); *id.* at 8 (stating that the board's decision is based on: "(1) the fact that access to the proposed site relies on the BLM right-of-way; and (2) psilocybin cannot be transported across federal lands because it is a Schedule A narcotic, prohibited under federal law"); *id.* at 13 ("psilocybin cannot legally be transported across federally owned land").

The county may not rely on application of the federal Controlled Substances Act to find that the adequate transportation access factor is unsatisfied. In *McNichols*, we explained that land use review bodies are not competent to render interpretations of easement terms and that a final and authoritative determination regarding the intent and scope of deeds, easements, and similar real estate agreements can be obtained only in circuit court, based on application of real estate law. 79 Or LUBA at 146. Similarly, the county is not a competent review body to decide whether any particular proposed use of land violates federal law or to provide any land use right or restriction based on federal law. The parties do not acknowledge, but we recognize, that sometimes county land use action is constrained by federal law. For example, the Religious Land Use and Institutionalized Persons Act (RLUIPA) restricts a local government's ability to regulate religious land uses. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 516, 518 (2018), *aff'd*, 296 Or App 903, 439 P3d 1060 (2019). Local government conditions on land use approvals may not violate property rights protected by the Fifth and Fourteenth Amendments of the United States Constitution. *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987); *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). However, here the county has not explained, and we do not understand, that the federal Controlled Substances Act imposes any obligations or restrictions on the county acting within its quasi-judicial land use

authority. We agree with petitioner that the county erred by concluding that the federal Controlled Substances Act required the county to deny the applications.

C. Interpretation of the BLM ROW Grant

Respondents also argue that the county's reasoning does not depend on the county applying federal law but, instead, depends entirely on a plain reading of the BLM ROW grant. Petitioner argues, and we agree, that argument relies on us agreeing with the county that the hearings officer and the board did *not* interpret that private agreement. We agree with petitioner that either the county impermissibly applied the federal Controlled Substances Act, based on the interpretations provided by BLM employees Clark and Streit, or the county impermissibly relied on its own interpretation of the BLM ROW grant, which, as we explain above, is ambiguous and disputed.

Both sides in this appeal cite *H2D2 Properties, LLC v. Deschutes County*, 80 Or LUBA 528 (2019) (*H2D2*). Petitioner cites *H2D2* for the proposition that the county should not rely on its own interpretation of the terms of a private access agreement to determine whether the site has adequate transportation access. Differently, respondents rely on *H2D2* for the proposition that the county does not err by denying a conditional use based on uncertainty or dispute regarding the terms of an access easement.

In *H2D2*, the petitioner appealed a board of commissioners decision denying CUP and site plan approval for a marijuana dispensary. Access to the subject property was over a 30-foot-wide easement across the intervenors'

property, approximately 20 feet of which were paved and used as an access aisle connecting the subject site to a public street. The intervenors disputed the petitioner's right to further improve or utilize the easement to serve the proposed site for marijuana retail use. The hearings officer approved the CUP and site plan with a condition of approval requiring the petitioner to document that the access aisle would be improved to 24 feet wide prior to issuance of building permits and/or initiation of the use. The intervenors appealed the hearings officer's decision to the board of commissioners, which denied the applications for a variety of reasons, including that the site lacked adequate transportation access for purposes of DCC 18.128.015(A)(2).

We affirmed the board's decision. We explained that the county code required a 24-foot minimum width for two-way traffic access and egress. The board concluded that the 20-foot-wide improved access aisle was insufficient. The board expressly declined to interpret the easement. We agreed with the petitioner that the board could have relied on the 30-foot-wide easement as evidence of legal access and imposed a condition of approval requiring the access to be improved to the code requirements, as the hearings officer had. However, we reasoned that the board was not required to do so. In denying the application the board did not interpret the easement and instead looked simply at the evidence that the existing access aisle was inadequate transportation access to serve the proposed conditional use.

H2D2 is distinguishable. There, the county relied on the fact that the existing improved access was *physically* insufficient to satisfy the county code requirement for 24-feet-wide, two-lane access/egress. Differently, here, there is no dispute that there is adequate physical access to the subject site. The only dispute is whether a federal prohibition of psilocybin possession and transportation on federal land makes the transportation access inadequate for the proposed conditional use.

Respondents also point out that we stated in *McNichols* that unambiguous provisions in a private contract can be relied on by a decision maker as substantial evidence without the need for interpretation when determining compliance with an approval criterion. 79 Or LUBA at 139 n 8. For the reasons explained under the second assignment of error, we disagree with respondents that the terms of the BLM ROW grant are unambiguous and undisputed.

D. Conclusion

We reject respondents' argument that respondent did not apply federal law or interpret the BLM ROW in denying the application. We agree with petitioner that the board's denial is based on either its direct application of the federal Controlled Substances Act or its indirect application of the federal Controlled Substances Act in its interpretation of the BLM ROW, either of which is an improper basis for denying the applications.

The fourth assignment of error is sustained.

THIRD ASSIGMENT OF ERROR

In the third assignment of error, petitioner argues, in the alternative, that, even under the county's misinterpretation of DCC 18.128.015(A)(2), the county's conclusion that the site does not have adequate transportation access is incorrect and unsupported by substantial evidence. We need not and do not reach or resolve the third assignment of error.

DISPOSITION

We sustain the first assignment of error because we agree with petitioner that the county implausibly interpreted the term "access" in DCC 18.128.015(A)(2). We sustain the second assignment of error because we agree with petitioner that the county's finding that petitioner acknowledged that its proposed use is not allowed by the express terms of the BLM ROW is not supported by substantial evidence. We sustain the fourth assignment of error because we agree with petitioner that the county applied DCC 18.128.015(A)(2) in a manner that constitutes an unreasonable limitation on the location of the service center and the county impermissibly applied the federal Controlled Substances Act to deny the application.

The board's only basis for denying the applications relies on an implausible construction of DCC 18.128.015(A)(2) and the federal Controlled Substances Act, which is not a land use standard. The board concluded that all other applicable criteria were satisfied, with conditions. Record 9-11. The county has not identified any applicable standards that would require further review.

Thus, the "decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances" and reversal with an order to approve is the appropriate remedy. ORS 197.835(10)(a)(A).

The county's decision is reversed, with an order to approve the applications, subject to the unappealed conditions of approval.[3] *See Stewart v. City of Salem*, 58 Or LUBA 605, 622, *aff'd*, 231 Or App 356, 219 P3d 46 (2009), *rev den*, 348 Or 415 (2010) (applying ORS 197.835(10)(a)(A) and explaining that the "application" required to be approved under ORS 197.835(10)(a) "refers to the application as proposed at the time of the local government's denial, including any conditions of approval that the applicant has proposed and the local government has accepted").

The county's decision is reversed, and the county is ordered to approve the applications.

---

[3] We do not intend to foreclose the possibility that, at the time that the county grants approval of the applications as required by ORS 197.835(10)(a) and this decision, the county and petitioner might agree to include additional or modified conditions of approval.